The Central Law Journal.

ST. LOUIS, MAY 4, 1883.

CURRENT TOPICS.

An important addition was made this week to the already numerous line of decisions of the Federal Supreme Court on the constitutional questions arising upon the regulation of inter-State commerce, in the case of the Parkersburg, etc. River Transportation Co. v. City of Parkersburg. This case, which is one of considerable importance to all cities and towns along the Ohio and Mississippi rivers, arises out of the following state of facts: The City of Parkersburg, W. Va., built a wharf and established certain rates of wharfage, which the Parkersburg & Ohio Transportation Company complained of as extortionate and as being merely a pretext for levying a duty on tonnage. The company thereupon filed a bill in the Circuit Court of the United States to restrain proceedings in a suit brought in the State court for the purpose of collecting wharfage, and to have the wharfage ordinance declared illegal and void. This court holds, first, that as the ordinance on its face imposed a charge for wharfage only, though these charges might be unreasonable and extortionate, the court will not entertain an averment that they were in reality not intended as wharfage, but as a duty on tonnage. An inquiry into the secret intent of a body which imposes charges is inadmissible; whether it is one thing or another must be determined by the ordinance or regulation itself. Second, that wharfage is a charge for the use of a wharf made by the owner thereof, by way of rent or compensation, while a duty on the tonnage is a tax or duty charges for the privilege of entering, or trading, or lying in port or harbor, and can be imposed only by the government. Third, that whether a charge is for wharfage or a duty on tonnage is a question not of intent, but of fact and law. Fourth, that although wharves are related to commerce and navigation as aids and conveniences, yet, being local in their nature and requiring special regulations for particular places, control of them (in the absence of congressional legislation on the subject) belongs to the States in which they are situated. Fifth, that a suit will not lie in the Circuit Court of the United States for relief against exorbitant wharfage as a case arising under the constitution or laws of the United States, even though it be alleged that the wharfage was intended as a duty on tonnage. The decree of the court below in favor of the City of Parkersburg is therefore affirmed.

Facts are constantly accummulating which evidence the existance of a general and earnest demand, on the part of the profession, for the exercise of a greater degree of care and consideration by the judges of appellate courts to correct the tedious, useless and expensive prolixity that now mars the great majority of opimons which are filed, particularly it may be said, those which are written by men of mediocre caliber and attainments. Our neighbor, the *Ohio Law Journal*, has this to say in urging, with, it seems to us, superfluous gentleness, a reformation in this respect: "We have received so many communications and so many personal appeals form those who are among the best lawyers in the State, asking what can be done to induce the Supreme Court and the Supreme Court commission to write shorter opinions than usual, and to report only those cases entirely novel or involving new legal propositions, that we mention the matter, although at the risk of being considered meddlers. The tenor of the criticism to which we refer is not that there exists any prolixity, or that the opinions of the court are at all tedious or long drawn out. It is admitted—it *must* be admitted—that every sentence written by each of the judges is full of pertinent meaning. It is only suggested that less might be said. That where authorities are cited in support of the rulings, the simple citation ought to be made to suffice, leaving it to others to draw the conclusions or find the logic of the application. That the Supreme Court need not formulate any argument to justify its rulings; that where the question is new, the reasons for the decision may be briefly stated; and where there is a departure from the usual course of decision, that the opinion of the court ought not to be circumscribed."

DOCTRINE OF DESCRIPTIO PERSONÆ AS APPLIED TO BILLS AND NOTES.

I. Generally.—The doctrine that words descriptive of the business, occupation, or official character of a person, following his name in the body of an instrument or after the signature, operate only as a description of the person, and not to qualify or limit his obligation or liability, was well known to the old common law;[1] but it seems seldom to have been applied to negotiable instruments until comparatively recent times.

In the case of deeds and sealed instruments, the rule is very strict; except in cases of public agency, the instrument must be executed in the name of the principal, and his name alone should appear in the body of the instrument, otherwise, if it be not void, it will bind the party who signs and seals it, even though made on behalf of the principal, and the term "agent," or the like, will be deemed mere *descriptio personæ*.[2] The rule is to be applied with less strictness, however, in cases of unsealed instruments, and especially in cases of bills and notes, and other commercial contracts.[3]

We shall first consider this doctrine in its application to bills and notes executed by private agents.

II. Liability in Cases of Private Agency.—Judge Story states the general rule as follows: "If from the nature and terms of the instrument, it clearly appears not only that the party is an agent, but that he means to bind his principal and to act for him, and not to draw, accept or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language, in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity."[4]

He who takes negotiable paper contracts with him who on its face is a party, and with no one else; so that the fact of agency makes no difference if the name of the principal does not appear on the face of the instrument.[5] But if from the whole instrument the intent to bind the principal appears, it will do so, however informally expressed.[6]

An agent may execute a note in any one of three ways: 1. He may append to his signature words showing the character in which he signs, without any description of his relation in the body of the instrument. 2. He may disclose the name of his principal in the body of the note, without adding descriptive words to his signature; or 3. He may so disclose the name of the principal in the body, and also add descriptive words to his signature.

There is a sharp conflict in the authorities, but the weight of authority now seems to support the view that where an agent executes a note in the first way, that is, by merely adding descriptive words to his signature, he is personally liable,[7] although Professor Parsons, in his work on Bills and Notes,[8] says that in case of an agent so signing for a corporation, the corporation is bound, and there are some cases sustaining him.[9] It is doubt-

1 Combe's Case, 9 Coke, 76, decided in 1614; Parker v. Kett, 1 Ld. Raym. 658; Appleton v. Binks, 5 East, 148; Comm. Dig. Attorney, c. 14; Norton v. Herron, 1 Car. & P. 643.

2 Kiersted v. O. & A. R. Co., 69 N. Y. 343; Buffalo Catholic Inst. v. Bitter, 87 Id. 250; Whitford v. Laidler, 25 Hun (N. Y.), 136; Lutz v. Linthicum, 8 Pet. 165; Dayton v. Warne, 43 N. J. 659; White v. Skinner, 13 Johns. 307; Bryson v. Lucas, 84 N. C. ---; s. c., 24 Alb. L. J. 206; Morrison v. Bonmay, 29 Cal. 337; Einstein v. Holt, 52 Mo. 340; Brinley v. Mann, 2 Cush. 337; Hancock v. Younker, 83 Ill. 298; Deming v. Bullitt, 1 Blackf. 241; Hobbs v. Cowden, 20 Ind. 310; Quigley v. De Haas, 82 Pa. St. 267; Story on Agency, sec. 151; "Execution of Deeds by Agents," 14 Cent. L. J. 182.

3 Story on Agency, secs. 148 and 154; Insurance Co. v. De Wolf, 8 Pick. 56; Detroit v. Jackson, 1 Doug. (Mich.) 106; Smith v. Alexander, 31 Mo. 193; Andrews v. Estes, 11 Me. 267; Bank v. Wright, 3 Jones, 376; Echols v. Cheney, 28 Cal. 157; Whart. on Agency, sec. 283.

4 Story on Agency, sec. 155.

5 1 Dan. Neg. Insts., sec. 300; Byles on Bills, 37; Brown v. Baker, 7 Allen, 339; Bartlett v. Tucker, 104 Mass. 336; Metc. on Cont., 108; Stackpole v. Arnold, 11 Mass. 27; Sharpe v. Bellis, 61 Pa. 71; Story on Bills, sec. 76. An adopted name generally known, however, may be equivalent to the actual name, even though it be the agent's. Bartlett v. Tucker, *supra*; Brown v. Baker, *supra*; Minor v. Bank, 1 Pet. 46; New Market Savings Bank v. Gillett, 100 Ill. 254; s. c., 39 Am. Rep. 39; Melledge v. Boston Ins. Co., 5 Cush. 158; Trustees v. Johnson, 53 Ind. 273.

6 Means v. Swormstedt, 32 Ind. 87; Fuller v. Hooper, 3 Gray, 334; Carpenter v. Farnsworth, 106 Mass. 561; s. c., 8 Am. Rep. 362; Klostermann v. Loos, 58 Mo. 290; Pentz v. Stanton, 10 Wend. 271; Savage v. Rix, 9 N. H. 263; Story on Agency, secs. 164-169; Story on Prom. Notes, sec. 69.

7 Tennatt v. Bank, 1 Col. 278; s. c., 9 Am. Rep. 156; Thompson on Officers and Agents of Corporations, 85, and authorities cited in note 11, *et seq.*

8 1 Pars. on Bills & Notes, 168, and sec. 97.

9 Johnson v. Smith, 21 Conn. 627; Hovey v. Magill,

ful, however, if such was the law at the time he wrote, and certainly the weight of authority at the present day appears to be to the contrary.[10] Thus the addition of the word "agent," "trustee," or the like, has often been held of no avail.[11] Notes signed "A B, agent for the Churchman;"[12] "J T H, Treas. St. Paul's Parish;"[13] "J R L, President Rosendale M'fng Co."[14] "M M, as administrator, and surviving partner of M & M;"[15] "A, B and C, Trustees of the First Universalist Church of Pierceton;"[16] "R T, Secretary Masonic Female College,"[17] have been held binding on the agent. So a note beginning, "I promise," and signed "A, B, C, as Trustees of the First Universalist Church," was held the note of the individual signers.[18] And where the note began, "We promise," and was signed G M, Treasurer of the M. F. D. Association," it was held the note of the agent, and it seems that the use of the plural pronoun in such cases instead of the singular, makes no difference.[19] An exception to the rule occurs in the case of cashiers of banks, and a note payable to the cashier is deemed payable to the bank.[20]

In the second class of cases, where the name of the principal is disclosed in the body, but no descriptive words added to the signature, it may be said to be the rule that, although the names of both principal and agent do appear in the body of the instrument, it is the contract of him who signs it, unless there be apt words to show another intention.[21] But if apt words are used, it makes no difference who signs.[22]

In the third class of cases, where there are descriptive words showing the principal, in both body and signature, courts are more inclined to hold the principal liable,[23] though all depends on the intention as gathered from the whole instrument and the rule is substantially the same here as in the other cases.[24]

Any expression or *indicia* from which the court can gather the intention of the parties will be carefully considered. Thus a promise "as" agent of a corporation, or "in behalf of" a corporation, binds the principal.[25] So where the corporate seal was affixed to the note, it was held the note of the corporation.[26]

2 Id. 680; Shelton v. Darling, Ib. 435; Babcock v. Beman, 11 N. Y. 200; Bailou v. Talbott, 16 Mass. 461.

[10] See criticism on Prof. Parsons, in 1 Dan. Negot. Instr., sec. 404, and also by Editor American Reports, 87 Am. Rep. 143, note.

[11] Toledo Iron Works v. Heizer, 51 Mo. 128; Kenyon v. Williams, 19 Ind. 45; Towne v. Rice, 122 Mass. 67; Collins v. Ins. Co., 17 Ohio St. 215; Pumpelly v. Phelps, 40 N. Y. 59; Christian v. Morris, 50 Ala. 585; Graham v. Campbell, 56 Ga. 258; Hall v. Bradbury, 40 Conn. 32; Arnold v. Sprague, 34 Vt. 409; Thurston v. Mann, 1 Ia. 231; Rand v. Hale, 3 W. Va. 495.

[12] De Witt v. Walton, 9 N. Y. 571.

[13] Sturdivant v. Hull, 59 Me. 172; S. C., 8 Am. Rep. 409.

[14] Moss v. Livingston, 4 N. Y. 208; also, Burbank v. Posey, 7 Bush (Ky.), 373.

[15] Studebaker Manf. Co. v. Montgomery, 74 Mo. 101; Rittenhouse v. Arumerman, 64 Mo. 197.

[16] Hayes v. Brubaker, 65 Ind. 28; Hays v. Matthews, 63 Id. 412; Hays v. Crutcher, 54 Ind. 266. So as to similar notes, Hovey v. Bannister, 8 Cow. 71; Tilden v. Barnard, 43 Mich. 376; S. C., 8 Am. Rep. 197; Brockway v. Allen, 17 Wend. 41.

[17] Drake v. Flewellen, 33 Ala. 106.

[18] Burlingame v. Brewster, 79 Ill. 515; S. C., 82 Am. Rep. 178. It would seem, however, that the word *as* might be considered as showing this to be the note of the corporation. See note 25 below.

[19] Mellen v. Moore, 68 Me. 390; S. C., 28 Am. Rep. 77; Whitmore v. Nickerson, 125 Mass. 496; Holmes v. Sinclair, 19 Ill. 71.

[20] Nave v. Hadley, 74 Ind. 155; Bank v. Wheeler, 21 Id. 90; First Nat. Bank v. Hall, 44 N. Y. 395; Folger v. Chase, 18 Pick. 67; Farmer's Bank v. Troy City Bank, 1 Doug. (Mich.) 473; Garton v. Union Bank, 34 Mich. 279; Pratt v. Topeka Bank, 12 Kan. 570; Baldwin v. Bank, 1 Wall. 234; Houghton v. First Nat. Bank, 26 Wis. 663; S. C., 7 Am. Rep. 107; Fogg v. Virgin, 19 Me. 353; Pack v. White, 78 Ky. 243; Dutch v. Boyd, 81 Ind. 147; 1 Dan. on Negot. Instr., sec. 417.

[21] Powers v. Briggs, 79 Ill. 493; Burlingame v. Brewster, Ib. 515, S. C. 22 Am. Rep. 175 and 177; Leadbetter v. Farrow, 5 M. & S. 345; Sowerby v. Butcher, 2 E. & M. 368; Kendall v. Morton, 21 Ind. 205.

[22] Whitney v. Stow, 111 Mass. 368; Bank v. Dix, 123 Id. 148; Klosterman v. Loos, 58 Mo. 290; Pitman v. Kintner, 5 Blackf. 251; Shaver v. Ocean Mining Co., 21 Cal. 45; Armstrong v. Kirkpatrick, 79 Ind. 527; (correcting an inaccurate *dictum* to contrary in Hayes v. Matthews, 63 Ind. 412); Moral School Tp. v. Harrison, 74 Ind. 93; Wallis v. Johnson School Tp., 75 Id. 358.

[23] Mann v. Chandler, 9 Mass. 335; Blanchard v. Kaull, 44 Cal. 448; Jones v. Clark, 42 Id. 180; Yowell v. Dodd, 3 Bush. (Ky.) 581; 1 Pars. N. & B. 169; Roberts v. Button, 14 Vt. 195.

[24] Barlow v. Congregational Society, 8 Allen. 460; Fiske v. Eldridge, 12 Gray. 476; Mears v. Graham, 8 Blackf. 144; Aimeu v. Hardin, 60 Ind 119; Hypes v. Griffin, 89 Ill. 134; 1 Dan. Negot. Instr. sec. 405.

[25] Blanchard v. Kaull, 44 Cal. 448; Sanborn v. Meal, 4 Minn. 137; Ligon v. Irvine, 1 Rich. (S. C.) 502; Dow v. Moore, 47 N. H. 419; Leach v. Blow, 16 Miss, 221; Barlow v. Cong. Society, 8 Allen, 460; Bank v. Doe, 123 Mass. 151; Steam v. Allen, 25 Hun. 558; Olcott v. Tioga R. R. Co. 27 N. Y. 546; Haskell v. Cornish, 13 Cal. 45; Andrews v. Estes, 11 Me. 267; Pearse v. Welborn, 42 Ind, 331; Lindus v. Melrose, 2 H. & M. 293; Aggs v. Nicholson, 1 H. & M. 162; But see Burlingame v. Brewster, 79 Ill, 515; Morrell v. Coddington, 4 Allen, 403; Pomeroy v. State, 16 Vt. 220; Kendall v. Morton, 21 Ind. 205.

[26] Means v. Swormstedt, 32 Ind. 87, S. C. 2 Am. Rep. 330; Carpenter v. Farnsworth, 106 Mass. 561;

III. Liability of Public Agents.—There are few cases in which the liability of public agents signing negotiable paper has been considered, but it is well settled that in cases of parol and ordinary simple contracts made or signed by such agents, the presumption is that the contract is with the government rather than the agent.[27] They stand on peculiar ground and it is not to be presumed that the agent means to bind himself personally when he might just as well make the government a party, or that a party dealing with him in his public character means to rely upon his individual responsibility.[28] Whether this distinction in favor of public agents can be extended to negotiable paper is yet, to some extent, an open question. The editor of the American Reports in an adverse criticism of Kendall v. School Town of Monticello, takes the ground that their liability is to be determined in such case by the rules governing private agents;[29] but Mr. Daniels in the last edition of his valuable work on Negotiable Instruments says the distinction should be made,[30] and this we think the better view. It has been held in a number of cases, that the presumption is in favor of a public agent, and that he will bind his principal even in a sealed instrument, where he would bind himself if acting as a private agent,[31] *a fortiori*, then, would he not be bound in a note or bill, where, as we have shown, the rule is less strict than in cases of sealed instruments. So the cases in which orders drawn by one officer upon another have been held binding on the corporation, lend support to this view.[32] There are cases in which no such distinction is made,[33] but it may have been merely overlooked, and in cases where the court's attention seems to have been called to the matter, the distinction is made.[34]

IV. Extrinsic Evidence. — As a general rule, whether the contract is that of the principal or of the agent, must be ascertained from the instrument alone, and neither oral nor written evidence is admissible *dehors* the instrument.[35] But where a bill or note is so drawn and signed that it is impossible to determine from its face the true character and meaning of the instrument and who was intended to be bound thereby, or where it is so uncertain as to admit of no just construction, parol evidence may often be admitted as between the original parties, to show the true intent.[36]

W. F. ELLIOTT.

Indianapolis, Ind.

Hitchcock v. Buchanan, 105 U. S. 416. See also Lacy v. Dubuque Lumber Co., 43 La. 510; Hood v. Hollenbeck, 7 Hun. 362. *Contra*, Dutton v. Marsh, L. R. 6 Q. B. 361.

[27] Crowell v. Crispin, 4 Daly (N. Y.) 100; Hall v. Lauderdale, 46 N. Y. 70; Pine Civil Township v. Huber Manf. Co., 83 Ind. 121; McKenzie v. Board, 72 Ind. 189; Wallis v. Johnson School Township, 75 Id. 368; Parks v. Ross, 11 How. 369; Dugen v. U. S., 3 Wheat, 172; Irish v. Webster's Greenlf., 171; Walker v. Christian, 21 Grat. 291; Cook v. Irvine, 5 S. & R. 492; Brown v. Austin, 1 Mass. 208; s. c., 2 Am. Dec. 11; Walker v. Swartwout, 12 Johns. 444; s. c., 7 Am. Dec. 334; Butler v. Mitchell, 15 Wis. 355; Adams v. Whittelsey, 3 Conn. 560; Macbeth v. Halidmand, 1 T. R. 180; Newman v. Sylvester, 42 Ind. 106: Perrin v. Lyman, 32 Ind. 16; s. c., 10 Am. Law. Reg. 188; Burroughs' Pub. Sec., 10, sec. 3.

[28] 2 Kt. Com. 632; Story on Agency, sec. 302, and cases *ubi supra*.

[29] 37 Am. Rep. 142 note.

[30] 1 Dan. Negot. Instr. 443*a*.

[31] Stinchfield v. Little, 1 Greenlf. (Me.) 231; s. c., 10 Am. Dec. 65; Hodgson v. Dexter, 1 Cranch, 345; Urwin v. Wolseley, 1 Term. Rep. 674; Providence v. Miller, 11 R. S. 272; Dawes v. Jackson, 9 Mass. 490; Sheets v. Selden, 2 Wall. 177; 1 Add. Contr. 155, sec. 91; 1 Hild. Contr. 593.

[32] Graves v. McWilliams, 1 Pin. (Wis.) 491; Tutt v. Hobbs, 17 Mo. 486, both decided expressly on ground of public agency; Brownlee v. Board, 81 Ind. 186; Kelly v. Mayor, 4 Hill. 265; Wall v. Co. of Monroe, 103 U. S. 77.

[33] Cahokia School Trustees v. Kantenberg, 88 Ill. 219; Wing v. Glick, 56 Ga. 473; Fowler v. Atkinson, 6 Minn. 579; Anderson v. Pearce, 36 Ark. 293; s.c., 38 Am. Rep. 39.

[34] School Town of Monticello v. Kendall, 72 Ind. 91; s. c., 37 Am. Rep. 139, cited with approval in several latter cases; Sanborn v. Meal, 4 Minn. 126; Hodges v. Runyan, 30 Mo. 491; and see, Baker v. Chamble, 4 Greene (Ia.) 428; Lyon v. Adamson, 7 Ia. 509; Fox v. Drake, 8 Cow. 191.

[35] Haverhill Ins. Co. v. Newhall, 10 Allen. 130; Fiske v. Eldridge, 12 Gray 474; Tucker Manf. Co. v. Fairbanks, 98 Mass. 101; Sturdivant v. Hill, 59 Me. 172; s. c., 8 Am. Rep. 409; Farmatt v. Bank, 1 Col. 278; s. c., 9 Am. Rep. 156; Hayes v. Brubaker, 65 Ind. 27; Williams v. Second Nat. Bank, 83 Id. 237; Bartlett v. Hawley, 120 Mass. 1 Greenlf. 92; Ev. sec. 275-577; 1 Am. Lead. Cas. 628-629 notes; Whart. Agency, sec. 290.

[36] Hood v. Hallenbesh, 7 Hun. 367; Hager v. Rice, 4 Col. 90; Hardy v. Pilcher, 57 Miss. 18; s. c., 34 Am. Rep. 432; Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; McClelan v. Reynolds, 49 Mo. 314; Bank of Newbury v. Baldwin, 1 Cliff. 519; Scanlon v. Keith, 102 Ill. 634; Haile v. Peirce, 32 Md. 327; s. c., 3 Am. Rep. 139; Lazarus v. Shearer, 2 Ala. 718; Kean v. Davis, 21 N. J. L. 683; Vater v. Lewis, 36 Ind. 288; Admitted in many cases in Missouri on the ground of *latent ambiguity*. Smith v. Alexander, 31 Mo. 193; Shuetze v. Bailey, 40 Mo. 69; Musser v. Johnson. 42 Mo. 74; Washington etc. Ins. Co. v. St. Mary's Seminary, 52 Id. 480-556.

FENCE LAW.

At common law in England, no one was obliged to fence his land, except by force of prescription or contract. A person owning cattle must beep them on his own land at his peril, and is liable for damages caused by them if they escape; but he may confine them in any way he chooses. No one need take any precautions to prevent cattle from an adjoining close from trespassing on his own land. The want of a fence is no objection to recovery for damages done by animals, except as it is made so by statute, contract or usage.[1] This doctrine of the common law of England is recognized as the common law of Maine, New Hampshire, Vermont, Massachusetts, New York, New Jersey, Delaware, Maryland, Indiana, Kentucky, Michigan, Minnesota, and perhaps some other States.[2] In several States this rule of the common law is not in force, and the owner of cattle is not obliged to confine them to his own property, but the occupant of land must, at his own peril, keep them out. This is the rule in Ohio, California, North Carolina, South Carolina, Georgia, Missouri, Mississippi, Texas and Colorado.[3] In these States, if he does not properly fence his land, the owner can not recover for damage done his property by his neighbor's cattle, but is himself liable to the owner of cattle for any injury they may receive on his premises, the same as if they entered with his permission. In Pennsylvania, Iowa and Illinois, a rule midway between these two has been established. It is no trespass for cattle to enter on any unfenced lands; but the owner can not recover damages for injuries to his cattle caused by straying on another's land.[4]

The reasons for not adopting the common law rule in many of our States are well given in the case of Seely v. Peters.[5] In this case the court says: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If the common law prevails now, it must have prevailed from the earliest settlement of the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, they brought with them, and adopted as applicable to their condition, a rule of law requiring every one to fence up his cattle? That they designed the millions of fertile acres stretched out before them to grow ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State is unlike any of the Eastern States in their early settlement; because, from the scarcity of timber it must be many years yet before our extensive prairies can be fenced, and their luxuriant growth, sufficient for thousands of cattle, must be suffered to decay where it grows, unless settlers upon their borders can be permitted to turn their cattle upon them." In accordance with this reasoning, we find that, as a rule, with several exceptions, however, in the newer States and Territories, and those adapted for grazing, either by the decisions of the courts or by statutes, cattle are allowed to range at will, and those cultivating the ground must fence their possessions to keep them out.[6] In Utah, while, by the general law owners of cattle are liable for damages for trespassing on another's land, whether fenced or not, yet the inhabitants of any district may by vote, allow cattle to range at large, and require owners of cultivated fields to fence them up.[7] In most of the States the subject is regulated by statute.

In nearly all the States statutes have been passed concerning the building and maintenance of division fences on the boundary line between adjoining proprietors, and providing generally, that when the owners of the two estates can not agree, application may be made to fence viewers, who shall decide the disputed questions. These statutes generally provide what shall be considered a sufficient and lawful fence.

The object of fencing is to provide against damage caused by or to domestic animals properly restrainable by a common fence.

[1] 20 Edw., IV. 10.

[2] Harlow v. Stinson, 60 Me. 347; Lyon v. Merrick, 105 Mass. 71.

[3] Cleveland, etc. R. Co. v. Elliott, 4 Ohio St. 474; Comerford v. Dupuy, 17 Cal. 308.

[4] North Penn. R. Co. v. Rehaman, 49 Pa. St. 101; Wagner v. Bissell, 3 Iowa, 396; Stoner v. Shugart, 45 Ill. 76.

[5] Seely v. Peters. 5 Gilw. (Ill.) 130.

[6] Colorado, Morris v. Fraker, 5 Colo. 425; Montana, Code Sts. 373, sec. 1; Nebraska, Comp. Sts. 49, secs. 19, 21; Washington Territory, Code, sec. 2590; Nevada, Comp. Laws, 3992, 3994.

[7] Comp. Laws, chap. 3, secs. 1, 2.

One is not obliged to fence against such small animals as would pass through or under an ordinary fence, nor against such wild animals as would break through. If an animal breaks through a sufficient fence, and trespasses on another's land, the owner is liable for the damage done by it,[8] and can not recover for any injury suffered by the animal in consequence of such trespass.[9] It was held in Missouri, that when a wild buffalo bull breaks into a close, the owner of the premises may kill him if necessary to protect his property from destruction, although the land was not fenced in the manner required by statute.[10] It is, however, ordinarily not lawful to kill animals trespassing on one's own land.[11] The owners of uninclosed land may drive off trespassing cattle into the highway, and are not liable for injuries they may afterwards receive.[12] The owners of cats or dogs can not at common law be held responsible for trespasses committed by them.[13]

The obligation to fence applies only in favor of animals lawfully on the adjoining lands. Therefore, if an animal trespassing on the land of another, breaks through a defective fence from such land onto the premises of a third person, the owner can not recover damages from such third person, although he is bound to keep the fence in repair.[14] The public have no rights in a highway, except the right to pass and repass thereon. Therefore, cattle left to graze on the highway are not lawfully there; and if they escape through a defective fence onto adjoining lands, their owner can not recover for damages received by them; nor can he avail himself of the defect in the fence in an action brought against him by the owner of the land for damages sustained by him.[15]

A person who is legally bound to maintain a fence, can not recover damages caused by its defect. Where two persons own adjoining lands, separated by a division fence, one part of which one owner is bound to repair, and the remainder the other is to maintain, neither party can recover damages occasioned by reason of a defect in his own part of the fence, but may collect for damages occasioned by cattle breaking through his neighbor's part, although his own is equally defective.[16] If no particular part of the division fence belongs to either party to maintain, in Maine and Connecticut, no damages can be recovered on account of trespass by reason of defect or absence of a fence.[17] In other States, however, either party could recover, under the common law rule, that owners of cattle must in some way keep them at home or be responsible for damage caused by them.[18]

An agreement to maintain a fence on a boundary line is irrevocable, except by mutual consent, or in some manner provided by statute.[19] A covenant in a deed of lands, to maintain a fence between the granted premises and the remaining land of the grantor, runs with the land, and is an incumberance on the grantor's land.[20] A person who is bound to erect a division fence, may build half of it on the land of the adjoining owner,[21] and he has also a right to enter upon his neighbor's land if necessary to erect such fence, and to remove materials and tools used in building.[22] In England, however, it seems that a person building a division fence must build it entirely on his own land.[23] A fence when erected is part of the freehold.[24] Therefore if a man builds a fence on his neighbor's land, it becomes the property of the owner of the land on which it was built. But it has been held that if a fence intended to make a division line is by mistake erected on another line, it may be removed to the true boundary within a reasonable time after the mistake is discovered.[25] This is also generally provided for by statute.

The law concerning railroad fences does not materially differ from that of ordinary fences except as it is changed by statute. At common law, a railroad company, like any other owner of land, is not obliged to fence. There-

[8] Rice v. Nagle, 14 Kan. 499.
[9] Morrison v. Comelius, 63 N. C. 346.
[10] Canefox v. Crenshaw, 24 Mo. 199.
[11] Clark v. Killiher, 107 Mass. 406; Johnson v. Patterson, 14 Conn. 1.
[12] Humphrey v. Douglass, 11 Vt. 22.
[13] Blair v. Forehend, 100 Mass. 140.
[14] Lawrence v. Coombs, 31 N. H. 331.
[15] Stackpole v. Healy, 16 Mass. 33; Holliday v. Marsh, 3 Wend. 141.
[16] Shepperd v. Hoes, 12 Johns. 433.
[17] Gonch v. Stephenson, 13 Me. 371; Studwell v. Ritch, 14 Conn. 292.
[18] Thaver v. Arnold, 4 Met. 589; Johnson v. Voing, 3 Mich. 163.
[19] York v. Davis, 11 N. H. 241.
[20] Bronson v. Coffin, 108 Mass. 175.
[21] Newell v. Hill, 2 Met. 180.
[22] Carpenter v. Harsay, 57 N. Y. 657.
[23] Vowles v. Miller, 3 Taunt. 138.
[24] Brown v. Budges, 31 Iowa 138.
[25] Martin v. Calhoun, 44 Mo. 368.

fore, where the common law rule is in force, an owner of cattle injured while trespassing upon a railroad track, can not recover without proof of negligence on the part of the company.[26] In most of the States, railroads are obliged by statute to fence their land. In England, and in Vermont, New Hampshire and Massachusetts, the benefit of these statutes is confined to the owners of animals lawfully on the adjoining land, and a railroad company is not liable to others, unless the injury resulted from the willful or negligent acts of the company or its servants.[27] In most States, however, the benefit of the statutes is extended to all owners of animals. Although fences and cattle-guards have been erected, and are maintained as required by law, yet the company is liable for its negligence and wilful acts, subject to the same rules as other parties guilty of negligence.[28]

It has been stated that contributory negligence on the part of the plaintiff, is no defense in an action against a railroad company for injury to animals; the want of a proper fence being proved. This probably means that a person is not obliged to forego the use of his land in consequence of the neglect to fence on the part of the company, and the owner may recover if he turns his animals into his field, although he knows it is unfenced and they are liable to be injured.[29] A person who wilfully turns his cattle on a railroad track, can not recover for their injury.[30] If the owner of land adjoining a railroad carelessly leaves a gate open through which his cattle stray out onto the track, the company is not liable.[31] When a proper fence has been erected along the road, it is the duty of the adjoining proprietors to notify the company of a defect in the fence, when they know of such defect. If they fail to do so they can not recover for injuries received by reason of such defect, unless it was known by some agent of the road whose duty it was to communicate notice of it to the officer having charge of such matters.[32]

EDMUND P. KENDRICK.

Springfield, Mass.

[26] Housatonic R. R. Co. v. Knowles, 30 Conn. 313.
[27] Eames v. Salem & Lowell R. Co., 98 Mass. 560.
[28] Illinois Central R. Co. v. Middlesworth, 46 Ill. 495.
[29] Shepard v. Buffalo, etc. R. Co., 35 N. Y. 641.
[30] Corwin v. N. Y. etc. Erie R. Co., 13 N. Y. 42.
[31] Indianapolis R. Co. v. Shiner, 17 Ind. 295.
[32] Poler v. N. Y. C. R. Co., 16 N. Y. 476.

DONATIO CAUSA MORTIS — CERTIFICATE OF DEPOSIT — DELIVERY WITH QUALIFICATIONS.

BASKET v. HASSELL.

United States Supreme Court, March 26, 1883.

1. A *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation of the donor, or by the donor's surviving the apprehended peril or outliving the donee, or by the occurrence of a deficiency of assets to pay the debts of the deceased donor.

2. If the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.

3. A delivery of a chose in action, which does not confer upon the donee the present right to reduce the fund into possession by enforcing the obligation according to its laws will not suffice in case of a gift *causa mortis*.

4. Where the indorsement which accompanied the delivery of a certificate of deposit, qualified it, and limited and restrained the authority of the donee in the collection of the money so as to forbid its payment until the donor's death, it was held not to be a present executed gift *mortis causa*, but a testamentary disposition void for want of compliance with the statute of wills.

5. Where the condition, annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and the contingency contemplated is the donor's death, the gift can not be executed in the donor's life-time, and, consequently, can never take effect.

Appeal from the Circuit Court of the United States for the District of Indiana.

P. Phillips and *W. Hallett Phillips*, for appellants; *Asa Iglehart*, for appellees.

Mr. Justice MATTHEWS, delivered the opinion of the court:

This is a bill in equity, filed by the appellee, a citizen of Tennessee, to which, besides the appellant, a citizen of Kentucky, The Evansville National Bank of Evansville, Indiana, Samuel Bayard, its president, and Henry Reis, its cashier, and James W. Shackelford and Robert D. Richardson, attorneys for Basket, a citizen of Indiana, were made parties defendant. The single question in the case was, whether a certain fund, represented by a certificate of deposit, issued by the bank to Chaney in his lifetime, belonged to Basket, who claimed it as a gift from Chaney, having possession of the certificate, or to the appellee, as Chaney's administrator. Basket asserted his title not only by answer, but by a cross-bill. The final decree ordered the certificate of deposit to be surrendered to the complainant, and that the bank pay to the complainant, as its holder, the amount due thereon. The money was then tendered by the bank, in open court, and the certificate was deposited with the clerk. It was

thereupon ordered, Baskett having prayed an appeal, that until the expiration of the time allowed for filing a bond on appeal, the bank should hold the money as a deposit at four per cent. interest, but if a bond be given, that the same be paid to the clerk, and by him loaned to the bank on the same terms. Basket failed to give the bond required for a supercedeas, but afterwards prayed another appeal, which he perfected by giving bond for costs alone. To this appeal Basket and the appellee are the parties respectively, the co-defendants not having appealed, or been cited after severance. And on the ground that they are necessary parties, the appellee has moved to dismiss the appeal.

It is apparent however, that the sole controversy is between the present parties to the appeal. By the delivery of the certificate of deposit to the clerk the attorneys of Basket are exonerated from all responsibility; and the payment of the money by the bank equally relieves it and its officers; for, not being parties to the appeal, and the execution of the decree not having been superseded, the decree will always furnish them protection, whether affirmed or reversed, because, if reversed, it would only be so as between the parties to the appeal. So that the omitted parties have no legal interest, either in maintaining or reversing the decree, and, consequently, are not necessary parties to the appoal. Simpson v. Greely, 20 Wall. 152; Cox v. United States, 6 Pet. 182; Forgay v. Conrad, 6 How. 203; Germain v. Mason, 12 Wall. 261. The motion to dismiss the appeal is accordingly overruled.

The fund in respect to which the controversy has arisen was represented by a certificate of deposit, of which the following is a copy:

"EVANSVILLE NATIONAL BANK,
"Evansville, Ind., Sept. 8, 1875.

"H. M. Chaney has deposited in this bank twenty-three thousand five and fourteen and 70-100 dollars, payable in current funds, to the order of himself, on surrender of this certificate properly indorsed, with interest at the rate of six per cent. per annum, if left for six months.

"$23,514.70 "HENRY RHIS, Cashier."

Chaney, being in possession of this certificate at his home in the County of Sumner, State of Tennessee, during his last sickness and in apprehension of death, wrote on the back thereof the following indorsement:

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

"H. M. CHANEY."

Chaney then delivered the certificate to Basket, and died, without recovering from that sickness, in January, 187 .

It is claimed on behalf of the appellant that this constitutes a valid *donatio mortis causa*, which entitles him to the fund; and whether it be so, is the sole question for our determination.

The general doctrine of the common law as to gifts of this character is fully recognized by the Supreme Court of Tennessee as a part of the law of that State. Richardson v. Adams, 10 Yerger, 273; Sims v. Walker, 8 Humph. 503; Gass v. Simpson, 4 Cold. 288.

In the case last mentioned, that court had occasion to consider the nature of such a disposition of property, and the several elements that enter into its proper definition. Among other things, it said: "A question seems to have arisen, at an early day, over which there was much contest, as to the real nature of gifts *causa mortis*. Were they gifts *inter vivos*, to take effect before the death of the donor, or were they in the nature of a legacy, taking effect only at the death of the donor. At the termination of this contest, it seems to have been settled that a gift *causa mortis* is ambulatory and incomplete during the donor's life, and is therefore revocable by him and subject to his debts, upon a deficiency of assets, not because the gift is testamentary or in the nature of a legacy, but because such is the condition annexed to it, and because it would otherwise be fraudulent as to creditors; for no man may give his property who is unable to pay his debts; and all now agree that it has no other property in common with a legacy. The property must pass at the time and not be intended to pass at the giver's death; yet, the party making the gift does not part with the whole interest, save only in certain events; and until the event occurs which is to divest him the title remains in the donor. The donee is vested with an inchoate title, and the intermediate ownership is in him; but his title is defeasible until the happening of the event necessary to render it absolute. It differs from a legacy in this, that it does not require probate, does not pass to the executor or administrator, but is taken against, not from him. Upon the happening of the event upon which the gift is dependent, the title of the donee becomes, by relation, complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently, the gift is *inter vivos*." In another part of the opinion (p. 297) it is said: "All the authorities agree that delivery is essential to the validity of the gift, and that, it is said, is a wise principle of our laws, because delivery strengthens the evidence of the gift, and is certainly a very powerful fact for the prevention of frauds and perjury."

In the first of these extracts there is an inaccuracy of expression, which seems to have introduced some confusion, if not an apparent contradiction, when, after having stated that "the property must pass at the time and not be intended to pass at the giver's death," it is added, that "until the event occurs which is to divest him the title remains in the donor." But a view of the entire passage leaves no room to doubt its meaning; that a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the hap-

pening of any of the conditions subsequent; that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.

This statement of the law, we think, to be correctly deduced from the judgments of the highest courts in England and in this country; although, as might well have been expected, since the early introduction of the doctrine into the common law from the Roman civil law, it has developed, by new and successive applications, not without fluctuating and inconsistent decisions.

"As to the character of the thing given," says Chief Justice Shaw, in Chase v. Redding, 13 Gray, 418-420, "the law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank; subsequently it has been extended to bonds and other choses in action, in writing or represented by a certificate, when the entire equitable interest is assigned; and in the very latest cases on the subject in this commonwealth, it has been held that a note not negotiable, or if negotiable, not actually indorsed, but delivered, passes, with a right to use the name of the administrator of the promisee, to collect it for the donee's own use," citing Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Parish v. Stone, 14 Pick. 203.

In the case last mentioned—Parish v. Stone—the same distinguished judge speaking, of the cases which had extended the doctrine of gifts *mortis causa* to include choses in actions, delivered so as to operate only as a transfer by equitable assignment or a declaration of trust, says further, that "these cases all go on the assumption that a bond, note or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession." He had, in a previous part of the same opinion, stated that "the necessity of an actual delivery had been uniformly insisted upon in the application of the rules of the English law to this species of gift." (p. 204.)

In Camp's Appeal, 36 Conn. 88, the Supreme Court of Errors of Connecticut held that a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits, on the general ground that a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser is a sufficient delivery to constitute a valid gift of such chose in action without a transfer of the legal title. That was the case of a gift *inter vivos*. But the court say, referring to the case of Brown v. Brown, 18 Conn. 410, as having virtually determined the point: "It is true that was a donation *causa mortis*, but the principle involved is the same in both cases, as there is no difference in respect to the requisites of a delivery between the two classes of gifts." And so Justice Wilde, delivering the opinion of the court in Grover v. Grover, 24 Pick. 261-264, expressly declared that "a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale;" that the title passed, and the gift became perfected by a delivery and acceptance; that there was, therefore, "no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase;" and showed, by a reference to the cases, that there was no difference in this respect between gifts *inter vivos* and *mortis causa*.

In respect to the opinion in this case, it is to be observed that it cites with approval the case of Wright v. Wright, 1 Cowen, 598, in which it was decided that the promissory note, of which the donor himself was maker, might be the subject of a valid gift *mortis causa*, though the concurrence was not upon that point. That case, however, has never been followed. It was expressly disapproved and disregarded by the Supreme Court of Errors of Connecticut in Raymond v. Sellick, 10 Conn. 480, Judge Waite, delivering the opinion of the court; had been expressly questioned and disapproved in Parish v. Stone, 14 Pick. 198-206, by Shaw, C. J., and was distinctly overruled by the Court of Appeals of New York in Harris v. Clark, 3 Comstock, 93. In that case it was said: "Gifts, however, are valid without consideration or actual value paid in return. But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails. Without delivery the transaction is not valid as an executed gift; and without consideration it is not valid as a contract to be executed. The decision in Wright v. Wright was founded on supposed distinction between a gift *inter vivos* and *donatio mortis causa*. But there appears to be no such distinction. A delivery of possession is indispensable in either case."

The case from which this extract is taken was very thoroughly argued by Mr. John C. Spencer for the plaintiff and Mr. Charles O'Connor for the defendant, and the judgment of the court states and reviews the doctrine on the subject with much

learning and ability. It was held that a written order upon a third person, for the payment of money, made by the donor, was not the subject of a valid gift, either *inter vivos* or *mortis causa*; and the rule applicable in such cases, as conceded by Mr. O'Connor, was stated by him, as follows: "Delivery to the donee of such an instrument as will enable him by force of the instrument itself, to reduce the fund into possession, will suffice, is the plaintiff's doctrine. This might safely be conceded. It might even be conceded that a delivery out of the donor's control of an instrument, without which he could not recover the fund from his debtor or agent, would suffice."

The same view, in substance, was taken in deciding Hewitt v. Kaye, L. R., 6 Eq. 198, which was the case of a check on a banker, given by the drawer *mortis causa*, who died before it was possible to present it, and which was held not to be valid. Lord Romilly, M.R., said: "When a man on his deathbed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a chose in action, and the delivery of the instrument confers upon the donee all the rights to the chose in action arising out of the instrument. That is the principle upon which Amis v. Witt, 33 Beav. 619, was decided, where the donor gave the donee a document by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a check is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money, and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing."

Accordingly the Vice-Chancellor, *In re* Beek's Estate, L. R., 13 Eq. 489, refused to sustain as a valid gift a check upon a banker, even although its delivery was accompanied by that of the donor's pass-book.

The same rule, as to an unpaid and unaccepted check, was followed in Second National Bank of Detroit v. Williams, 13 Mich. 282. The principle is that a check upon a bank account is not of itself an equitable assignment of the fund (Bank of the Republic v. Millard, 10 Wall. 152), but if the banker accepts the check, or otherwise subjects himself to liability as a trustee, prior to the death of the donor, the gift is complete and valid. Bromley v. Brunton, L. R., 6 Eq. 275.

Contrary decisions have been made in respect to donations *mortis causa* of savings bank books, some courts holding that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. Pierce v. Boston Savings Bank, 129 Mass. 425; Hill v. Stevenson, 63 Me. 364; Tillinghast v. Wheaton, 8 R. I. 536. The contrary was held in Ashbrook v. Ryan, 2 Bush, 228, and in McGonnell v. Murray, Ir. Rep., 3 Eq. 460.

That a delivery of a certificate of deposit, such as that described in the record in this case, might constitute a valid *donatio mortis causa*, does not admit of doubt. It was so decided in Amis v. Witt, 33 Beav. 619; in Moore v. Moore, L. R., 18 Eq. 474; Hewitt v. Kaye, L. R., 6 Eq. 198; Westerlo v. DeWitt, 36 N. Y. 340. A certificate of deposit is a subsisting chose in action and represents the funds it describes, as in cases of notes, bonds and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls.

The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to divest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos*, but upon the recognized conditions subsequent, in case of a gift *mortis causa*; and that a delivery which does not confer upon the donee the present right to reduce the fund in possession by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: Powell v. Hellicar, 26 Beav. 261; Reddell v. Dorbee, 10 Sim. 244; Farquharson v. Cave, 2 Coll. 356; Hatch v. Atkinson, 56 Me. 324; Beeran v. Markham, 7 Taunt. 224; Coleman v. Parker, 114 Mass. 30; Wing v. Merchant, 57 Me. 383; McWillie v. Van Vacker, 35 Miss. 428; Egerton v. Egerton, 17 N. J. Eq. 420; Michener v. Dale, 23 Pa. St. 59.

The application of these principles to the circumstances of the present case require the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*. That transaction would have enabled the donee to reduce the fund into actual possession, by enforcing payment according to the terms of the certificate. The donee might have forborne to do so, but that would not have affected his right. It can not be said that obtaining payment in the lifetime of the donor would have been an unauthorized use of the instrument, inconsistent with the nature of the gift; for the gift is of the money, and of the certificate of deposit, merely as a means of obtaining it. And if the donee had drawn the money, upon the surrender of the certificate, and the gift had been

subsequently revoked, either by the act of the donor or by operation of law, the donee would be only under the same obligation to return the money, that would have existed to return the certificate, if he had continued to hold it, uncollected.

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa*, but a testamentary disposition, void for want of compliance with the statute of wills. The right conferred upon the donee was that expressed in the indorsement; and that, instead of being a transfer of the donor's title and interest in the fund, as established by the terms of the certificate of deposit, was merely an order upon the bank to pay to the donee the money called for by the certificate, upon the death of the donor. It was, in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, can not be valid as a *donatio mortis causa*, even where it is payable *in presenti*, unless paid or accepted while the donor is alive; how much less so, when, as in the present case, it is made payable only upon his death.

The case is not distinguishable from Mitchell v. Smith, 4 De G., J. & S. 422, where the indorsement upon promissory notes, claimed as a gift, was, "I bequeath—pay the within contents to Simon Smith, or his order, at my death." Lord Justice Turner said: "In order to render the indorsement and delivery of a promissory note effectual, they must be such as to enable the indorsee himself to indorse and negotiate the note. That the respondent, Simon Smith, could not have done here during the testator's life." It was accordingly held that the disposition of the notes was testamentary and invalid.

It can not be said that the condition in the indorsement, which forbade payment until the donor's death, was merely the condition attached by the law to every such gift. Because the condition, which inheres in the gift *mortis causa*, is a subsequent condition, that the subject of the gift shall be returned if the gift fails by revocation; in the meantime the gift is executed, the title has vested, the dominion and control of the donor has passed to the donee. While here, the condition annexed by the donor to his gift is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift can not be executed in his lifetime, and, consequently, can never take effect.

This view of the law was the one taken by the circuit court as the basis of its decree, in which we accordingly find no error. It is, accordingly, affirmed.

Mr. Justice MILLER did not sit in this cause, and took no part in its decision.

NOTE.—This will be recognized as one of the most important opinions announced by the Supreme Court for several years. Indeed, a few observations will show that it must take rank as a leading case wherever the common law prevails.

Though *donatio causa mortis* has been familiar to lawyers and judges, as a part of the common law, for more than a century, not merely as a direct derivation from the civil law, from which it comes to us, but as a defined doctrine of the common law different, in many essential particulars from the *donatio causa mortis* of the civilians; yet the subject has never been before litigated in that court, and when it is considered that this class of gifts has been the subject of frequent discussion and adjudication in the courts of most of the United States, and of elaborate definition and illustration by almost all the modern text-writers upon testamentary dispositions of personal property, it seems a wonder that till now the subject has never been discussed or adjudicated in the highest judicial tribunal of the nation.

Among the distinguished American judges who have defined and discussed this branch of the law more or less elaborately are Chief Justices Gibson and Tillman and Judge Woodward of Pensylvania, Chief Justices Shaw of Massachusetts, Redfield of Vermont, Judge Story and Chancellor Kent. Added to this array of American learning, which has tended to define the limits of the doctrine of gifts of this class in their application to their subjects, as well as to develop the same and apply it to new combinations, we have had the advantage of the learning of such equity judges in England as Lords Cooper, Hardwicke and Eldon, as well as their more modern successors who, though more conservative than the American judges, are now in perfect harmony with the American courts upon this head of the law. Only one recognized change in this branch of the law has occurred since its introduction into the common law, and this arises largely from the prevalence of equitable over legal principles in the transfer of commercial or *quasi* commercial paper. Formerly *choses in action* could not be the subject of a gift *mortis causa*. But as the law is now settled, as stated by Mr. Justice Matthews in the text of the opinion, the rule in this respect has changed so that they may be the subject of such gifts. But to the present time there have been two particulars in which there have been great want of uniformity in the decided cases. This want of uniformity may be indicated by two questions: 1. what apprehension of death must be present with the donor to sustain a gift *mortis causa*? 2. when does such a gift take effect?

The question as to the necessary apprehension of death from sickness has never been satisfactorily settled, for which Chief Justice Gibson, following the civil law, held that the apprehension of death from other "cause than sickness will suffice" Nicholas v. Adams, 2 Whart. 17. And the Supreme Court of Tennessee, following this opinion, held that the apprehension of death of a soldier, though in good health, enlisting in the war of the rebellion, was sufficient. Gass v. Simpson, 4 Caldw. 288. Judge Woodward, in Michener v. Dale, 23 Pa. St. 59, criticises Chief Justice Gibson upon this point, and insists that to make a gift of this class valid the donor must be "in his last illness or in *periculo mortis*." And the doctrine of Nicholas v. Adams and Gass v. Simpson upon this point has been discarded in many cases. Gourley v. Leisenberger, 21 Pa. St. 345; Dexheimer v. Gantier, 5 Rob. (N. Y.) 216; Irish v. Nutting, 47 Barb. 370; Smith v. Dorsey, 38 Ind. 45; Craig v. Kittridge, 46 N. H. 47.

The answers to the second inquiry have been equally wanting in their uniformity and varying; and the language of most of the authorities is that a gift *mortis causa* only "belongs fully to the donee" or "the gift is only perfect at the death of the donor," gives color to the idea that the property of the donee, in this class of gifts, is inchoate till the donor's death, and this seems to have been the theory of the definitions of most of the English and American judges and text writers, while the true idea of *donatio causa mortis* seems to have been pointedly uttered but a few times. It is a perfect gift *inter vivos* revocable upon certain conditions subsequent. This is the substance of the definition in Nicholas v. Adams, followed in Gass v. Simpson, *supra*, now endorsed by the Supreme Court of the United States, as the true result of the English and American cases.

The case of Basket v. Chaney's Admr., which is the subject of this note, was decided in the circuit court several years ago. The opinion of Judge Gresham in that court is reported in 8 Bissell 303, and is endorsed in the opinion under discussion.

Both the elements of this class of gifts already discussed, were pointedly presented in the record, and exhaustively argued before the supreme court by printed briefs as well as orally. But it must be matter of regret to the profession of the whole country that no allusion is made to the subject of the apprehension of death necessary to sustain gifts of this sort; or rather that the confusion into which this branch of the law has been thrown from false analogy to the rules of the civil law, instead of the common law, had not been reduced to order by the court in this case, and that the same master mind and hand which has presented in his opinion upon the point decided such a perfect harmony, and such transparent statement of principle and rule, as forever to settle the question, might have, by a like analysis, settled the other question, by giving utterance to some safe and certain rule, which would forever prevent the recurrence to so much uncertainty of decisions leading to useless discussion.

True there is no actual necessity for the discussion of this additional question, in order to determine the controversy in the case; that was as well decided by assuming the one or the other view of the evidence upon the point, as the result would not have been changed by the decision of that point the one way or the other; but the case belongs to a class wherein such a point may be discussed and decided upon its merits, or one view or the other, assumed at the pleasure of the court, and the allusion here is one regret, and not of criticism.

The question which was decided, and which was more or less fluctuating before, it is submitted is now at rest, that a gift *mortis causa* must pass to the donee, and all title to, and dominion over it, must pass from the donor in his life time. If the subject be a chose in action, and the same be unindorsed, the equitable title will pass by delivery, if it be given with intent to pass the title, and the proper apprehension of death exist, and the gift will be sustained. If, however, the chose in action, which is the subject of the gift, be endorsed and delivered, it must be so endorsed that the donee may endorse and negotiate it in the lifetime of the donor. But if the endorsement be in form, of testamentary, if it postpones the payment of the fund evidenced by the security till the death of the donor, then, notwithstanding the delivery of the writing, the gift will fail.

The profession will be greatly indebted to Mr. Justice Matthews for the clear, forcible, and elegant manner in which the principles of this branch of the law are stated and illustrated in this able opinion.

A. I.

INSURANCE — INSURABLE INTEREST — JUDGMENT CREDITOR.

SPARE v. HOME MUTUAL INS. CO.

United States Circuit Court, District of Oregon, March 28, 1883.

1. A contract for insurance against loss by fire is a contract of indemnity; and a contract to that end with a person who has no insurable interest in the property, or can not sustain any pecuniary loss by injury thereto, is a mere wager, contrary to public policy and void.

2. Any person who has a legal or equitable interest in property, or is so related to it that an injury to it may cause him pecuniary loss, has an insurable interest therein.

3. A judgment creditor has an insurable interest in the property of his debtor; but he can not recover from the insurer upon an injury thereto for a loss to himself, unless he also shows that the judgment debtor has not sufficient property left out of which the judgment can be satisfied.

4. While the insurer may be estopped to insist on conditions and restrictions contained in a policy is-

sued with a knowledge of facts inconsistent therewith, neither party to a contract of insurance which is void, as being contrary to public policy, is estopped to deny its legality.

W. Scott Beebe, for the plaintiff; *Cyrus Dolph*, for the defendant.

DEADY, J., delivered the opinion of the court:

The plaintiff, a citizen of Oregon, brings this action against the defendant, a corporation formed under the laws of California and doing business in Oregon, to recover the sum of $900 with interest since March 1, 1882, on a policy of insurance for that amount, against loss by fire. The case was heard upon a demurrer to the complaint. The question argued was, had the plaintiff an insurable interest in the property destroyed?

From the amended complaint it appears that on July 26, 1881, Aaron and Ben Lurch were partners under the name of "Lurch Brothers," and as such, owned a lot in Cottage Grove, Lane county, Oreg., of the value of $100, together with a warehouse thereon of the value of $1,300; that on December 1, 1878, the plaintiff obtained a judgment against said firm, in the circuit court of the State, for said county, for the sum of $4,500, which judgment was duly docketed before said July 26, and thereafter was a lien thereon; that on said last mentioned date, the defendant, in consideration of the premium of $18.90, paid to it by plaintiff, insured him against loss or damage by fire, to said warehouse, for one year, in the sum of $900, and that on February 14, 1882, said warehouse was totally destroyed by fire, whereby the plaintiff was damaged $1,300. The complaint also states that on March 1, 1882, the proof of loss was furnished and the same adjusted at $900, and that the defendant at all the times mentioned well knew that the property was owned by "Lurch Brothers," and the nature of the plaintiff's interest therein.

A contract for insurance against fire with a person not having an insurable interest in the property, or subject of the insurance, is a mere wager, and considered void on grounds of public policy. For where the only interest that the assured has in the property is its destruction by fire, the transaction is a direct incentive to fraud and arson.

A lawful contract of insurance against fire is, therefore, a contract of indemnity—an engagement to make good to the assured a pecuniary loss sustained by him, on account of injury to the property in question. Therefore it is said that the assured must have an interest in the property injured, for otherwise he can suffer no loss thereby. Woods F. Ins., sec. 248; Rohrbach v. Germania F. Ins. Co., 62 N. Y. 52; Grevemeyer v. The S. F. Ins. Co., 62 Pa. St. 340; McDonald v. Adm. of Black, 20 Ohio, 191; Carter v. The Humboldt F. Ins. Co., 12 Iowa, 287; Godin v. London Assurance Co., 1 Burr. 489; Hancox v. Fishing Ins. Co., 3 Sum. 134. But what is such an interest in the property is not altogether clear upon the authorities.

In Hancox v. Fishing Ins. Co., 3 Sum. 140, Mr. Justice Story says "that an insurable interest is *sui generis*, and peculiar in its texture and operation;" and that "It sometimes exists where there is not any present property or *jus in re*, or *jus ad rem*." In Rohrbach v. Germania F. Ins. Co., 62 N. Y. 54, Folger, J., said this interest need not amount to a legal or equitable title to the property, but that "If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest."

Accordingly, it has been held that a person having a specific lien upon property as a security for a debt, such as a mechanic or mortgagee, has an insurable interest therein, and that, although he may also have the personal obligation of his debtor for the payment of the same. Carter v. Humboldt F. Insurance Co., *supra*. And in Herkimer v. Rice, 27 N. Y. 163, it was held that the creditors of an insolvent estate had an insurable interest therein, upon the ground that the same was pledged by the law to the payment of the debts of the deceased. See also comments on Ch. J. Denio's opinion in this case, by Folger, J., in Rohrbach v. Germania F. Ins. Co., 62 N. Y. 57.

But no case has been found in which it was held that a judgment creditor, by reason simply of his lien on the judgment debtor's property, has an insurable interest therein. In Grevemeyer v. the S. M. F. Ins. Co., *supra*, it was distinctly held that he had not. The decision is placed on the ground that "a judgment is a general and not a specified lien. If there be personal property of the debtor, it is to be satisfied out of that. If there be not, then it is a lien on all his real estate without discrimination, and hence the plaintiff is not interested in the property as property, but only in the lien." It does not appear from the report of the case, whether the debtor had other property out of which the judgment might have been satisfied or not.

In considering this question, it ought not to be overlooked that insurance against loss, to the party insured, by fire, is a transaction intended and calculated to preserve and promote the financial security and stability of the community, and therefore ought to be regarded with favor and upheld by the courts. On the other hand, a wagering policy, by which the assured is to receive the insurance upon the destruction of the property, although he lost nothing thereby, the courts will not enforce.

But in my judgment, whoever is in danger of loss by fire ought to be allowed to insure against it. Whenever it appears that the assured has a pecuniary interest in the preservation of the subject-matter of the insurance against injury by fire, he has such an interest therein, or holds such

a relation thereto, as gives him a right to protect himself by insurance.

A judgment creditor, in Oregon, upon the docketing of his judgment, has a lien upon all the real property of the judgment debtor within the county, as a security for his debt. Oreg. Code, C. P., sec. 266. But such lien can not be enforced, if sufficient personal property can be found to satisfy the judgment. Id., sec. 273.

Under these circumstances if it appears that the debtor has no personal property and that his real property, with the combustible improvements thereon, is not more than sufficient to satisfy the judgment, I think the creditor ought to be regarded as having an insurable interest. Although he has no legal or equitable title to, or interest in the property, he certainly sustains such a relation thereto that any injury to it would cause a corresponding loss to him; and nothing more than this can be said of the right of a mortgagee, mechanic or even the legal owner to insure. In the corpus of the property insured he may have no interest or estate, but he has a pecuniary interest in its preservation and may sustain a loss by its destruction. Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389.

But when the judgment debtor has personal property out of which the judgment can be made or when the real property upon which it is a lien is clearly more than sufficient for that purpose, is the judgment creditor thereby precluded from protecting himself by insurance against possible loss from injury to his security by fire? This is a question upon which no direct decision has been produced. But upon general principles I think the creditor has an insurable interest; that is, he sustains such a relation to the subject as gives him an interest in its preservation against fire. The law gives the judgment creditor a lien on his debtors' real property as a security for his debt, and whatever may be its value as compared with the amount of the debt, if this value is chiefly or even partly owing to the buildings thereon, and is therefore liable to be depreciated by fire, the creditor sustains such a relation to the property that he may insure against loss by this injury to his security. And the fact that the debtor has more or less personal property at the time is immaterial. When the creditor concludes to enforce his judgment this personal property may have been destroyed or disposed of. And so, if the real property to which the lien extends, and upon which the insurance is affected, is then of much greater value than the debt, it may be of much less value before the creditor levies his execution upon it. And, if in the meantime it should be injured by fire he would sustain a loss which he ought to be allowed to protect himself against by insurance.

But, nevertheless, the lien of a judgment creditor is a general and not a specific one. And, although, as we have seen, circumstances may, in particular cases, make it the same in effect as a specific lien, these are not to be presumed, but must be shown.

The contract for insurance being one for indemnity only it follows that, while the judgment creditor may insure himself against loss by injury from fire to the whole or any part of his security —the property upon which his judgment is a lien —yet before he can recover on such contract as for a loss sustained by the peril insured against it, it must appear that at the time of the fire the amount of the judgment could not have otherwise been made on an execution against the property of the judgment debtor. If, notwithstanding the injury to the debtor's property by fire, he has sufficient left, out of which the judgment may be made, the creditor has sustained no loss, and can recover nothing from the insurer. His contract was against loss to himself by fire, not his debtor.

Now the complaint in this case is silent upon this point. True, it is alleged that the plaintiff sustained a loss by the burning of the warehouse. But as that conclusion does not necessarily follow from the premises, the allegation is not sufficient. The complaint should contain a statement of the facts showing the plaintiff's right to recover. And as his lien was *prima facie* a general one, on all the judgment debtor's real property, and not a specific one on this warehouse only, and was in effect conditioned on the debtor's want of personal property to satisfy the judgment, the complaint ought to show how the plaintiff sustained a loss by this fire—as that the warehouse was all the property of the judgment debtor subject to execution, or that what was left would not more than satisfy the remainder of the judgment.

The plaintiff also contends that the defendant, being well aware of the nature of his interest in the property at the time he effected the insurance thereon, is now estopped to say tha the had not an insurable interest therein.

Conditions and restrictions contained in a policy may be considered waived by a knowledge on the part of the insurer, of facts inconsistent therewith. In such case the the insurer may be estopped to insist on the condition, as that no other insurance existed on the property. Wood on F. Ins., sec. 498.

But a contract of insurance entered into contrary to law or public policy is simply void, and neither party to it is estopped from showing the fact. "Otherwise the public law and policy would be at the mercy of individual interest and caprice." *In re* Comstock, 3 Saw., 228. If the plaintiff sustained no such relation to this property as entitled him to have it insured against injury by fire his contract with the defendant to that effect was a mere wagering policy, and void, as being contrary to public policy.

But in my judgment the plaintiff was entitled to insure the property—he had a pecuniary interest it its preservation and might protect himself against possible loss by its destruction. His was not a wagering policy, as his right to the insurance was conditioned, not simply on the destruction of the property, but also his loss thereby.

However, his interest being that of a judgment

creditor, an injury to the property of his debtor was not necessarily a loss to him. That depended upon the condition in which it left the debtor. If he still had sufficient property liable to an execution where with to satisfy the judgment, the creditor lost nothing by the fire. As happens every day he simply insured against a possible loss, which he was fortunate enough not to sustain.

The demurrer is sustained.

MALICIOUS PROSECUTION—PROVINCE OF JURY—BURDEN OF PROOF.

SUTTON v. ANDERSON.

Supreme Court of Pennsylvania, April 16, 1883.

1. In an action for malicious prosecution, where the testimony of the plaintiff discloses probable cause for his arrest, it is the duty of the court to so instruct the jury, and direct a verdict for the defendant.

2. In an action for malicious prosecution the burden of proving want of probable cause is upon the plaintiff.

3. When the material facts of a case are undisputed, it is error for the court to instruct the jury: "Now it is for you to find in this conflicting testimony just what the truth is; and then you must decide this case in the light of the facts which surrounded the parties at the time."

Error to the Court of Common Pleas No. 2 of Philadelphia county.

John Walker Shortlidge, for the plaintiff in error; *J. Channing Nevin* and *E. Cooper Shapley*, for the defendant in error.

This was an action on the case for malicious prosecution.

The plaintiff below was a porter in the warehouse on Front street, in Philadelphia, who took samples of goods from the store of his employers, without their consent or knowledge, and exhibited the said goods to the prejudice of the firm who had discharged him. He was arrested for the theft of these samples, by the defendant, after their possession was demanded and recovered from the said plaintiff. The parties came to an understanding, and the criminal prosecution was not pressed. After his discharge from arrest the plaintiff brought this action. The verdict and judgment were for the plaintiff.

The defendant took this writ, and assigned the following errors: 1. The court erred in refusing the request of defendant to instruct the jury as follows: "Under all the evidence, if believed by you, there was probable cause for the arrest of Mr. Anderson, your verdict must therefore be for the defendant." 3. The learned judge erred in instructing the jury as follows: "Now it is for you to find in this conflicting testimony just what the truth is; and then you must decide this case in the light of the facts which surrounded the parties at the time." 4. The learned court erred in instructing the jury: "By Mr. Anderson's testimony it appears, and he states, that he had a right to the possession of the samples which he had at the time. That in addition to his duties as porter in the store, he took samples and sold goods at night. A fair inference from it is, that they were taken without any intent to appropriate them to his own use, and that there was no probable cause for his arrest based upon that state of facts." 5. The learned court erred in instructing the jury that "Mr. Sutton's testimony puts the matter in a very different light."

GREEN, J., delivered the opinion of the court:

A careful examination of the plaintiff's testimony has convinced us that he made out a clear case of probable cause for the prosecution against himself, and therefore that the defendant's point should have been affirmed, and a verdict directed for the defendant.

The plaintiff himself testified that he was employed by Sutton & Co. at six dollars per week, that he was a porter, and that he did nothing but manual labor. He said he had never sold a dollar's worth of goods for Sutton & Co. while he was with them; that he once had samples which Sutton had given him on his own request, stating that he would try and sell some to a friend. These samples were put up by Sutton, who delivered them personally to the plaintiff and marked the prices on them. He further testified that immediately after he was discharged, he went to Richardson, who was a customer of Sutton & Co.'s; that he had samples in his pocket which he showed to Richardson, and told him that Sutton & Co. delivered inferior goods to those they sold, and that he meant that Sutton & Co. were swindling and cheating their customers. He admits that he had taken the samples from Sutton & Co.'s store, from a lot of coffee that had just come in; that Sutton did not tell him to take the samples, and that no person saw him take them.

He further says, that Sutton did not know that he (Anderson) had the samples, and that he did not tell him to show them to Richardson, or use them in any way. He says also that he wrapped the samples in paper when he took them, put them in his pocket, kept them there until he returned them to Sutton on the evening of the day he was discharged, and that it was for stealing these particular samples that he was arrested. He also testifies, that when he returned in the afternoon to Sutton & Co.'s store for a pair of shoes, Sutton asked him where he got the samples of coffee from, and he replied he got them upstairs, and thereupon Sutton charged him with theft and sent for an officer. Charles Miller, a witness produced and examined by the plaintiff, said he was present in the afternoon when Anderson returned to the store, and heard the conversation between him and Sutton, and repeated it as follows: Mr. Sutton said, what have you been doing to-day? What did you go to Richardson's for? Where are those samples you showed him, and where are those samples you stole from up stairs? Anderson first said: I have

no samples. Mr. Sutton then said, yes you have, Richardson was here and told me all about it. Then Anderson said, yes, I have the samples. Mr. Sutton then demanded the samples, and received them from Anderson.

It is not easy to conceive how a stronger case o probable cause than this could be made out. The person who took the missing goods from the owner, admits that he took them without the knowledge, authority or consent of the owner, that he took them secretly, that he used them for a purpose of revenge, that he kept them until he was charged with their theft, and his witness proves, that when first asked for them he denied having them, but subsequently admitted having them, and delivered them to the owner. All the elements essential to prove larceny are present in this testimony, "the unlawful taking by one, of the property of another, without the knowledge or consent of the latter, and the conversion of the property taken to the use of the taker." To make the matter worse, the taker admits that he used the property for his own private and personal purpose, of revenge against the owner.

The facts as proven by the plaintiff and his witness, are far stronger than were the facts in the case of Bernar v. Dunlap, 13 Norris, 329, in which we sustained a compulsory nonsuit. There the prosecutor was simply informed by the word of a third person, that he had seen the prosecutor's gauntlets in possession of the plaintiff; while here the plaintiff himself not only admits that he took the goods, and took them secretly, but produced them from his pocket, and delivered them to the prosecutor on demand of the latter, who immediately charged him with theft, and sent for an officer to arrest him.

Miller, the plaintiff's witness, testified, that Sutton charged the plaintiff with theft in the first instance, and that Anderson at first denied having them, but after being told that Richardson had told Sutton all about it, admitted that he had them and delivered them to Sutton. Anderson's allegation, on the witness stand, that he took the samples the day before he was discharged, does not help his case in the least, as he does not say that he told that to Mr. Sutton, and he does not pretend that he had a general authority to take samples for any purpose. His statement that he took the samples to sell goods by, is emphatically disproved by his own testimony, that he used them with a customer of the house for the very purpose of preventing sales. It is not at all necessary to recur to Sutton's testimony to make out a case of probable cause. The burden of proving want of probable cause, rested upon Anderson, and he must also prove malice: Kirkpatrick v. Kirkpatrick, 3 Wright, 288; Dietz v. Langfitt, 13 P. F. Smith, 234; Bernar v. Dunlap, 13 Norris, 329.

The burden of proving probable cause was not shifted to the defendant in this case, because the plaintiff established it by his own testimony, and when this is the case it is the clear duty of the court to so instruct the jury. This is held in the cases of Deitz v. Langfitt and Bernar v. Dunlap, *supra*.

We think the learned judge was in error in the matter covered by the fourth assignment. It is certain Anderson did not testify that he had a right to the possession of the samples, so that in addition to his duties as porter he took samples and sold goods at night. The statement of the learned judge to that effect would tend to mislead the jury, and was hence erroneous. Nor do we think there was any conflicting testimony, as to any material facts of the case. Upon the testimony of the plaintiff and his witness, it is quite clear to us that probable cause for the prosecution was fully established.

The abandonment of the prosecution was entirely explained by Vansant, who said that Anderson promised he would go about his business, and never mention the name of Sutton again for reference or for any other purpose, if he, the witness, would induce Sutton to take this course.

The assignments of error are all sustained except the second and sixth.

Judgment reversed.

FRAUDULENT CONVEYANCE—PROPERTY PURCHASED FOR WIFE OUT OF HUSBAND'S EARNINGS.

ROBB v. BREWER.

Supreme Court of Iowa, April 3, 1883.

Where a husband pays for property, purchased in his wife's name out of his own personal earnings, it amounts to a gift to the wife; but if the earnings were exempt from execution at the time of such purchase, such a gift is not a fraud upon the husband's creditors.

Appeal from Marshall District Court.

This is an action in equity to subject the homestead of the defendants, who are husband and wife, to the satisfaction of a judgment recovered by the plaintiff against the defendant J. A. Brewer. The cause was tried to the court upon an agreed statement of facts. The death of Harrison Robb was suggested, and Hester A. Robb, his widow and beneficiary under his will, was substituted as plaintiff. The court decreed that the property in question be subjected to the payment of plaintiff's judgment, and that out of the proceeds of the sale thereof, there be first paid to Elizabeth F. Brewer the sum of $28.75. The defendants appeal.

J. M. Parker, for appellants; *W. H. Hammond*, for appellee.

DAY, C. J., delivered the opinion of the court:

The agreed statement upon which the cause was determined in the court below presents the following material facts:

On the first day of October, 1873, the defendant,

J. A. Brewer, executed to one W. I. Peake his promissory note for the sum of $300, with the plaintiff, H. Robb, as a surety. J. A. Brewer failed to pay the note when it became due, and judgment was recovered thereon in September, 1875, which judgment the plaintiff, as surety, paid in full January 8, and April 5, 1876. On the 14th day of February, 1879, H. Robb obtained a judgment against the defendant J. A. Brewer in the sum of $162.60, which judgment was for the money paid by plaintiff as surety for the defendant J. A. Brewer, and is wholly unsatisfied. On the 20th day of March, 1879, H. Robb assigned the judgment to C. B. Rhoades, and on the 21st day of October, 1881, C. B. Rhoades reassigned it to H. Robb. The defendants went into the occupancy of the premises, described in the petition as a homestead, in October, 1874, and now occupy them as such. Said premises were bought with the joint funds of the defendants.

The defendant Elizabeth F. Brewer furnished the defendant J. A. Brewer, her husband, with $25, which amount and interest thereon, at the rate of 10 per cent. per annum for the period of about eighteen months, together with an amount sufficient to make $150, was the purchase price of the lots in question. The purchase was made in October, 1874. The lumber and material used in the construction of the house upon said premises were worth about $110 at the time the house was built. Afterwards defendants added a summer kitchen, the lumber and material of which cost about $20. The defendant J. A. Brewer is a carpenter and joiner by trade, and works at his trade to support his family. All the money paid out and expended in the purchase and improvement of said premises, except the $25 and interest as aforesaid, the property of Elizabeth F. Brewer, was the wages earned by the defendant J. A. Brewer in his trade of carpenter and joiner, working by the day and piece, all of it being applied in the payment of said premises within ninety days after the same was earned. The defendant Elizabeth has been in the habit of keeping boarders, and has also done sewing, and the money so earned has been used in the support of the family and painting the house inside. The original contract of purchase of the lots was in writing, and in the name of the defendant Elizabeth F. Brewer. Afterwards a deed was executed to her for said premises in pursuance of the contract.

From the agreed facts, it appears that the contract for the purchase of the lots in controversy, which now constitute the homestead of the defendants, was made in the name of the defendant Elizabeth F. Brewer, and $25 of the purchase price was paid by her out of her own money. The balance of the purchase price, as well as all of the money which went into the improvements upon the land, arose from the personal earnings of the defendant J. A. Brewer, and the application of it was made within 90 days after it was earned, and it was, therefore exempt from execution, under section 3074 of the Code of 1873. It was perfectly competent for the defendant Elizabeth to make a purchase of the property in her own name, and use her own means towards the payment therefor. The use by the husband of his personal earnings in payment for property purchased by his wife amounts, in legal contemplation, to a gift of such property to his wife. As the earnings were exempt from execution at the time they were employed in the acquisition of the property in controversy, a voluntary gift of such earnings was no fraud upon the husband's creditors. The earnings being exempt from execution, the husband had right to employ them as he pleased. This has been held as to real estate. Dreutzer v. Bill, 11 Wis. 114; Pike v. Miles, 23 Wis. 164; Delashment v. Traer, 44 Iowa, 613. There is no reason why the same rule does not apply to personal property. We think the court erred in holding the homestead of the defendants liable for the debt in question. Reversed.

WEEKLY DIGEST OF RECENT CASES.

MAINE,	3, 17
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1. ALTERATION OF INSTRUMENT—BLANK ACCEPTANCE.

The defendant accepted a bill of exchange, the sum in the body of the bill being left in blank, but the figures £14 0s. 6d. being in the margin of the bill, which was the amount for which he intended to accept. The holder subsequently filled in the blank in the body of the bill with £164 0s. 6d., and fraudulently altered the figures in the margin to correspond. He then indorsed the bill to the plaintiffs, who took it as *bona fide* holders for value for the full amount. *Held*, that the defendant was liable on his acceptance for the larger amount; for that the marginal figures are not an essential part of a bill of exchange. *Garrard v. Lewis*, Eng. H. Ct., Q. B. Div.; 31 W. R., 476.

2. BANKRUPTCY—ACTION IN STATE COURT—STAY OF PROCEEDINGS.

A State court, in which an action against a bankrupt upon a debt provable in bankruptcy is pending, must, on the bankrupt's application under section 5106 of the Revised Statutes, stay all the proceedings to await the determination of the court in bankruptcy on the question of his discharge, unless unreasonable delay on his part in endeavoring to obtain his discharge is shown, or the court in bankruptcy gives leave to proceed to judgment for the purpose of ascertaining the amount due; even if an attachment has been made in the action more than four months before the commencement of the proceedings in bankruptcy, and has been dissolved by giving bond with sureties to pay the amount of the judgment to be recovered. And if the highest court of the State denies the application, and renders final judgment for the plaintiff, the bankrupt, although he has since obtained his certificate of discharge, may

sue out a writ of error from this court, and the assignee in bankruptcy may be heard here in support of the writ. *Hill v. Harding*, U. S. S. C., March 19, 1883; 2 S. C. Rep., 404.

3. BOND—PENALTY—LIQUIDATED DAMAGES.
When a bond is given in the sum of $500, to be paid on the failure to make a drain for a certain purpose and in a specified time, the sum is to be regarded as a penalty and not liquidated damages. A sum of money in gross, to be paid for the non-performance of a contract, is, as a general rule, to be considered as a penalty and not liquidated damages. *Smith v. Wedgwood*, S. C. Me., Feb. 22, 1883; Reporter's Advance Sheets.

4. CORPORATION — MEETING OF STOCKHOLDERS—EVIDENCE.
The minutes of a corporation are not the exclusive evidence of what took place at a meeting of the stockholders. The action of the stockholders may be proved by parol evidence, where such proof is not in conflict with any recorded action, but merely to supply that which was omitted from the minutes. *Harmony Building Ass'n v. Goldbeck*, S. C. Pa., Jan. 15, 1883; 40 Leg. Int., 172.

5. CRIMINAL LAW—SELECTION OF GRAND JURORS—INDICTMENT.
In the selection of a grand and petit jury for Baltimore county, under the provisions of the Act of 1870, ch. 220, one of the forty-eight names drawn for the general panel was that of a non-resident of the county. This name was not, however, among those which were drawn as grand jurors. *Held*, 1st. That whatever weight the non-residence of the party might have had in determining his own qualification as a petit juror, it had no substantial bearing upon the qualifications or fitness of those actually constituting the grand jury. 2d. That the statute was to be regarded mainly as directory in its multifarious provisions; and unless any irregularities incident to carrying out its directions in good faith, should be shown to materially violate it, or so affect the juries as to prejudice the rights of the citizen, these irregularities should not be treated as fatal. 3d. That the irregularity in this instance was no ground for a plea in abatement to an indictment found by said grand jury. *State v. Glascow*, Md. Ct. App., Dec. 21, 1882; Reporter's Advance Sheets.

6. EVIDENCE—CRIMINATORY QUESTIONS.
Where a witness on cross-examination, being asked questions which, if answered affirmatively, would tend to degrade and disgrace him, avails himself of the privilege accorded him by the court, and declines to answer, he can not rightly be asked, "why do you decline to answer these questions?" When he has declined to answer he has done all that the rule of law requires him to do. *Merluzzi v. Gleeson*, Md. Ct. App., Dec. 21, 1882; Reporter's Advance Sheets.

7. EVIDENCE — STATEMENT OF AGENT — CORPORATION.
A statement made by an agent to his principal can not be used against the latter by a third party; nor where the agent is the common agent of a body of persons, such as the chairman of a company, can a statement by him to the members of the body, e. g., at a statutory meeting, be used against the body by one of its own members, e. g. a shareholder. A, applied to have his name removed from the list of members of a company on the ground that he had been induced to take shares by false representations contained in a prospectus. At the hearing of the application he sought to use, in support of his contention as to the falsity of the prospectus, a statement made by the chairman of the company (after the issue of the prospectus) in course of explaining the company's affairs at a statutory meeting. *Held*, that he could not be allowed to do so. *R. Devala, Provident Gold M. Co. v. Ex Parte Abbott*, Eng. H. Ct., Ch. Div. Jan. 22, 1883; 48 L. T. R. 259.

8. EXEMPTION—PROPERTY DETAINED BY POUNDMASTER—REPLEVIN.
Action of replevin without claim of delivery, for three horses, the property of plaintiff, taken and detained by defendant as poundmaster. *Held*, that the statute of exemption is not broad enough in terms to embrace a proceeding like this. The exemption is only from "seizure and sale on execution, or provisions, or final process issued from any court or any proceedings in aid thereof." The power granted by legislature to the city in its charter by ordinance, "to restrain the running at large of cattle, horses," etc., and cause such as may be found running at large to be impounded and sold, is a police power necessary to the due protection of the public at large in the use and enjoyment of the public streets, to which the private rights of property and the ordinary exemption thereof from seizure and sale on execution or judgments in actions on contract or other incurred liability must, of necessity, be subordinate. *Held*, there was evidence to show that the horses were at large with knowledge and permission of plaintiff. *Held*, that the poundmaster is not one appointed or elected to an "office or place of trust" under the charter, who is therein required to take the constitutional and official oath, or give bond. *Held*, that the provision of the charter authorizing the ordinance to restrain, impound and sell animals running at large in the streets, and the ordinance itself, as far as they relate to restraining impounding and selling such animals are valid; and that part of both charter and ordinance making the fine of one dollar a charge upon the property, to be paid by the owner before he can take them away, and to be deducted from the proceeds of sale, void. *Wilcox v. Hemming*, S. C. Wis., April 4, 1883; 5 Wis Leg. N. 277.

9. FRAUDULENT CONVEYANCE — EVIDENCE — DATE OF DEED.
Where the date of a deed is prior to the entering of judgments against the grantor, and the deed is not acknowledged or recorded until after judgments have been entered, the natural inference of such conduct will be that the deed was executed to defeat the lien creditors. *McCandless v. Blakley*, S. C. Pa., Dec. 30, 1882; 40 Leg. Int. 162.

10. JURY TRIAL—DIRECTING A VERDICT—DISCRETION OF COURT.
The jury may be controlled in their determination of a question by a peremptory instruction, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony. *Montclair Township v. Dana*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 403.

11. MORTGAGE—USURY—LIMITATIONS.
In suits to enforce the lien of a mortgage for the satisfaction of the debt secured by it, if the debt is barred by the statute of limitations the foreclosure suit is barred, but not otherwise, for the mortgage is a mere incident of the debt. The defense of usury can not avail a party where the statute upon

which such defense is based has been constitutionally repealed, on the continued existence of which alone the defense rests. In an action for foreclosure, where the contract on which the judgment was founded stipulated for no rate of interest, the interest reserved being added to the principal in the note itself, the decree should not allow interest on the debt greater than the legal rate. The amount of the decree should be the sum actually due on the mortgage debt at the date of its maturity, with interest thereon at the legal rate per annum till the time of the decree, giving proper credits for payments made on account from time to time. *Ewell v. Daggs*, U. S. S. C., March 26, 1883, 2 S. C. Rep., 408.

12. MUNICIPAL BONDS — CONSTITUTIONAL LAW — PRESUMPTION OF BONA FIDES.

The authority of Montclair township, Essex county, New Jersey, to issue bonds to be exchanged for bonds of the Montclair Railway Company, sustained. The Constitution of New Jersey provides: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." *Held*, that this provision does not require that the title of an act shall embody a detailed statement, nor be an index or abstract of its contents; nor does it prevent the uniting in the same act of any number of provisions having one general object fairly indicated by its title; and that the powers, however varied and extended, which a new township may exercise, constitute but one object which is fairly expressed by a title showing nothing more than the legislative purpose to establish such township. The objections should be grave, and the conflict between the statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object, or if but one object, that it is not sufficiently expressed by the title. The holder of a negotiable security is presumed to have acquired it in good faith and for value. But if, in a suit upon it, the defense be such as to require plaintiff to show that value was paid, it is not, in every case, essential to prove that *he* paid value; for if any intermediate holder between him and the defendant gave value, such intervening consideration will sustain his title. *Montclair Township v. Ramsdell*, U. S. S. C., March 5, 1883; 2 S. C. Rep., 391.

13. NEGLIGENCE—OBLIGATION OF MUNICIPAL CORPORATION TO KEEP SEWERS IN REPAIR.

1. The city is bound to keep sewers erected by it in good condition and repair, and, if negligent in this duty and the sewer bursts and property is damaged, the city is liable in damages. 2. The city is bound to a reasonable degree of care and watchfulness in ascertaining the condition of their sewers from time to time, and in preventing dilapidations or obstructions; and where these are the ordinary result of the use of the sewer, which ought to have been anticipated, the omission to examine and repair is negligence. 3. Notice to the city of the bad condition of the sewer is not necessary. The mere absence of notice does not absolve it from liability, and if the defect existed and ought to have been discovered and repaired, the plaintiff need not, in order to recover, show actual notice to the city. 4. Notice to the city, where necessary, is not complied with by notice to a committeeman of Councils visiting the works. 5. The court charged "That if the jury believe the sewer burst only by reason of the unprecedented fall of rain on August 1st, 1878, the city is not chargable with negligence, such excessive rainfall being the act of God." *Held*, to be error. The proof being that the culvert was out of repair, the instruction should have been qualified, viz., unless the break was also owing to the defective condition of the sewer, there being no evidence that the unprecedented rain, beyond its capacity, either injured the foundation or washed away its supports. 6. The court rejected plaintiff's offer to prove the ruinous condition of the sewer at and near the place of the break previous to that date. *Held*, to be error. 7. The court, on the question of damages, permitted a witness for the defendant to testify what price he had paid for his own house in the neighborhood of the break. *Held*, to be error. The question in issue was the value of plaintiff's houses. 8. The court charged on the question of damages, that the plaintiff, if at all, could only "recover actual diminution of the value of his property, and can not recover for loss of rents." *Held*, to be error, and that he was entitled to rents during the repairs to the culvert which prevented the use of the property. 9. An independant contractor is not liable for the necessary delay in doing the work. The city, if any one, is liable, it being the direct consequence of the employer's negligence in permitting the dilapidation or obstruction. *Vanderslice v. Philadelphia*, S. C. Pa., April 16, 1883; 40 Leg. Int. 172.

14. REMOVAL OF CAUSES—INSEPARABLE CONTROVERSY.

In a suit brought to close up a partnership, where all the defendants, except two who have not answered, deny the existence of the partnership, and upon one side of that issue, as now made up, is a citizen of another State, and all the other answering defendants are citizens of the State where the suit was brought, the suit is not removable under the first clause of the second section of the act of March 3, 1875; neither is there a separable controversy such as would entitle the parties to a removal under the second clause. *Shainwald v. Lewis*, U. S. S. C., March 26, 1883; 2 S. C. Rep., 385.

15. REVENUE LAW—DUTIES ON IMPORTS—PROTEST—RECOVERY BACK.

Where, in an action to recover back duties, paid under protest, the only question is whether the suit was brought within ninety days after the decision of the secretary, as required by the act of Congress of June 30, 1864, and the suit was brought in the State court, the laws of the State must determine when suit was brought; and if that is prescribed by statute, the practice in other States or the rules of the common law is immaterial. *Goldenburg v. Murphy*, U. S. S. C., March 26, 1883; 2 S. C. Rep., 388.

16. SERVICE OF PROCESS—SHERIFF'S RETURN.

A sheriff's return to a summons, that he served it by leaving a copy at the defendant's usual place of residence, is not conclusive as to the fact of residence, but the defendant may show that the place where the copy was left was not, at the time, his residence, on a motion to quash the service. *Walker v. Lutz*, S. C. Neb., March 22, 1883; 1 Denv. L. J., 79.

17. TREASURE TROVE — PROPERTY ABANDONED, DERELICT, LOST.

The owner of a tannery, when removing his hides,

omitted to remove all. The tannery was sold, and many years after, the plaintiff, while laboring for the defendant in erecting a factory on the premises, discovered the hides so left. *Held*, 1. That the owner of the hides or his representative, had not lost their title to the same. 2. That the finder acquired no title to the same, they being neither lost, abandoned, nor derelict, nor treasure trove. *Livermore v. White*, S. C. Me., Feb. 22, 1883; Reporter's Advance Sheets.

RECENT LEGAL LITERATURE.

BURNS' NEW INDEX OF INDIANA REPORTS. An Index or abbreviated Digest of the Supreme Court Reports of the State of Indiana, from 1st Blackford to 77th Indiana, inclusive. By H. Burns. Cincinnati, 1882: Robert Clarke & Co.

The popularity of these indexes or species of short digest, with the profession, is well deserved, for they are extremely handy and convenient labor-saving devices. This one seems to us to be one of the most perfect of the class that we have seen. The matter is well and logically arranged, and the work very carefully done.

CARLTON ON HOMICIDE. The Law of Homicide, together with the Trial for Murder of Judge Wilkinson, Dr. Wilkinson and Mr. Murdaugh; Including the Indictments, Evidence and Speeches of Hon. S. S. Prentiss, Hon. Benjamin Hardin, E. J. Bullock, Esq., Judge Rowan, Col. Robertson and John B. Thompson, Esq., of Counsel, in Full. By A. B. Carlton. Cincinnati, 1882: Robert Clarke & Co.

Elderly members of the profession in the West and South, whose memories can carry them back to the early days of stage-coaches and steamboats, will remember the tragedy that occurred at Louisville in the winter of 1838, and the excitement that attended the trial that resulted from it. The proceedings upon the trial are well worthy the attention of the law student. The address to the jury by S. S. Prentiss is one of the best studies in advocacy we have ever seen.

NEW YORK CONDENSED REPORTS of Cases decided in the Court of Appeals of the State of New York, From October, 1881, to October, 1882. Vol. I. New York, 1883: New York Weekly Digest Co.

The object of this publication, which is issued in the form of periodical parts, intended afterwards to be bound together in a volume, is to furnish the profession with abbreviated reports of decisions, as soon as possible after they are rendered. The cases are carefully and accurately reported, and it seems to us the series is destined to become indispensable to the New York practitioner.

PRINCIPLES OF THE LAW OF INSURANCE, Adopted in the Civil Code of the State of California, with Notes and References to Adjudged Cases. By William Barber. San Francisco, 1882: Sumner, Whitney & Co.

The title page of this little hand-book fairly discloses its scope and object. The work of its compilation seems to be accomplished with care and accuracy. The citation of authorities seems pretty full and includes cases from all the States alike.

NOTES.

——If the "ball," or cushion-like surface of the top joint of the thumb be examined, it can be seen that in the center—as, indeed, in the fingers also—is a kind of spiral formed of fine grooves in the skin. The spiral is, however, rarely, if ever, quite perfect—there are irregularities, or places where lines run into each other here and there. Examining both thumbs, it will be seen that they do not exactly match; but the figure on each thumb is the same through life. If the thumbs of any two persons are compared, it will further be found that no two are alike. There may be, and generally is, a "family resemblance" between members of the same family, as in other features; there are also national characteristics; but the individuals differ. All this is better seen by taking "proof impressions" of the thumb. This is easily done by pressing it on a slab covered with a film of printers' ink, and then pressing it on a piece of white paper; or a little aniline dye, Indian ink—almost anything—may be used. The Chinese take advantage of all this to identify their important criminals, at least in some parts of the Empire. We photograph their faces; they take impressions from their thumbs. These are stored away, and if the delinquent should ever again fall into the hands of the police, another impression at once affords the means of comparison. The Chinese say that, considering the alteration made in the countenance by hair and beard, and the power many men have of distorting or altering the actual features, etc., their method affords even more certain and easy means of identification than our plan of taking the criminal's portrait. Perhaps we might with advantage take a leaf out of their book.—*World of Wonders.*

——The rival of the lawyer who is trying to get hold of the "Betty and the baby" fund to reimburse himself for his efforts in defending Mason, has turned up at Caseyville, Ky., a town that was one of the many overwhelmed by the Ohio river flood, and dependent on outsiders for relief from prolonged suffering. Mayor Jacob, of Louisville, visited Caseyville some days ago, and finding six families more destitute than the rest, had $50 given to each of them One of these pittances has now been attached for the satisfaction of a debt by an unfeeling creditor.